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No. _____

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UNITED STATES SUPREME COURT
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ARMOUR & COMPANY,

Petitioner,

vs.

CURTIS HOLSEY, JACKIE L. DRAKEFORD,
JULIUS FRAZIER, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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VOL. I

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IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CURTIS HOLSEY, et al., Plaintiffs, and MYNELL BENNETT, Intervening Plaintiff, v. ARMOUR AND COMPANY, et al., Defendants.	)	CIVIL ACTION NO. C-C-77-57

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Curtis Holsey, Jackie L. Drakeford and Julius Frazier filed this action on March 4, 1977. They alleged that they and other black employees of and applicants for employment with defendant Armour and Company

(hereinafter referred to as the "Company") were discriminated against and denied equal employment opportunities because of their race and color. The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and its Local 525[1] (the Union) were also named as defendants.

The practices of the Company and Union were alleged to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. §1981. Jurisdiction of the Court was invoked pursuant to Title VII, 42 U.S.C. §2000e-5(f)(3), 28 U.S.C. §1343 and 28 U.S.C. §1331.

Plaintiffs prayed that the proceeding be certified as a class action pursuant to Rule 23(b)(2) consisting of all past, present and future black employees and applicants for employment who have been, or may in the future, be denied employment opportunities by defendants because of race and color.

Holsey, Frazier and Drakeford filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) on March 7, 1974. Following a cause determination, EEOC, on January 8, 1977, issued right-to-sue letters and this proceeding followed within the 90-day period permitted by Title VII.

Mynell Bennett was allowed to intervene in the proceeding as a plaintiff on June 2, 1977. Bennett had previously filed a charge with EEOC on January 27, 1972, alleging that she had been denied employment and an opportunity to establish permanent employment status because of her race. She also alleged that the defendants maintained racially separate jobs and job classifications. Following a cause determination by EEOC, Bennett obtained a right-to-sue letter and timely moved for leave to intervene.

After reviewing the pleadings, the pre-trial discovery evidence, affidavits,

briefs and arguments of the parties, the Court, on May 1, 1978, conditionally certified this action as a class action and defined the class, with respect to the Company, as:

> All black applicants for employment and all present and former black employees at . . . [the Company's] Mecklenburg County, North Carolina, facility, who were employed or sought employment at any time since July 27, 1971, in maintenance and production, and in sales, clerical and salaried positions, and who may have been or may be affected by the discriminatory practices alleged in the complaint, . . . However, no class certified as to the defendant unions should include either applicants for non-production jobs or non-production employees, since (a) the unions have no representational capacity with respect to such individuals, and (b) named plaintiffs assert claims against the unions only in their capacity as representatives of production employees.[2]

Notice of the pendency of the action was served on all class members as defined.

Defendants have denied plaintiffs' material allegations and have submitted various procedural and substantive motions.[3]

Trial hearings were held on March 27, 28,

31 and April 1 - 4, 1980. Based on the evidence received and the briefs and arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Company has operated a meat processing facility in Mecklenburg County at its present location since 1958. It prepares meat products for sale and distribution to retail and wholesale outlets in North Carolina, South Carolina, Tennessee and Georgia. (Plaintiffs' Exhibit 42, pp. 12-13 and Exhibit 43, p. 2)

2. The production operation of the Company is divided into four departments:

Operation - shipping, receiving, storage and transportation

Beef - preparation of beef products

Sausage - preparation of sausage

Maintenance - repairs and maintenance of

vehicles, plant and facilities.

Additionally, the Company has maintained an Office for accounting, data processing, sales, laboratory research and various clerical functions. (Plaintiffs' Exhibits 23 and 45)

3. Hourly paid, production employees have been represented by the Union since 1957. (Plaintiffs' Exhibit 42, pp. 13-14 and Exhibits 22a - 22f) The Union has no authority or responsibility with respect to Office employees, supervisors or managers or hourly paid employees pending completion of their probationary period.

4. Defendants have established departmental seniority for production employees to govern job progression, promotion, layoff and recall. Company or date of hire seniority governs vacations, pension or retirement benefits, sick leave and other fringe benefits. (Plaintiffs' Exhibits 22a - 22f)

5. Plaintiffs Holsey, Frazier and Drakeford were initially hired by the Company in production. Holsey was hired on December 1, 1969; Frazier on July 21, 1969; and Drakeford on June 17, 1969.

6. In their applications for employment, only Holsey and Frazier indicated a specific job to which they would like to be assigned, Holsey for warehouse shipping and Frazier for meat cutter or truck driver. All three, however, were initially assigned to Operations as laborers or lugger-loaders. (Plaintiffs' Exhibits 15-17)

7. At the time of plaintiffs' initial employment, black employees were basically assigned to Operations. One or two black employees were in Beef; no black male was in Sausage. There was and never had been a black supervisor or salesman or a black employee in the Office except in a laborer's position. (Plaintiffs' Exhibit 42, pp. 26-28; Exhibit 24; Answer to Interrogatory 6; Exhibit 25;

Answer to Interrogatory 1)

8. Shortly after their initial employment, plaintiffs were reassigned to the Beef Department and worked there on a continuous basis until lay-offs began in 1973 and 1974.

9. Between 1969 and 1973, the Company experienced a growth in sales and increased its work force from approximately 90 to over 200 employees. Since 1974, its production work force has decreased to approximately 133 at the time of trial, approximately 50 of whom worked regularly. (Trial Transcript pp. 125-128)

10. With the decrease in sales, the Company began to lay off its production employees in Beef and subsequently in Sausage and Operations. Employees were laid off pursuant to their departmental seniority with the employee with the least departmental seniority being the first to be laid off. However, employees with 5 years or more

seniority were allowed to use their Company or date of hire seniority to bump junior employees in other departments. Thus, Beef employees with 5 or more years of Company or date of hire seniority were allowed to bump junior employees in Sausage or Operations. Highly skilled or trained employees in Maintenance were not subject to this bumping provision pursuant to a side or supplemental agreement between the Company and Union in 1971. The 1976 Collective Bargaining Agreement reduced the 5 or more year requirement for bumping across departments to 1 year. (Trial Transcript, pp. 28-82, 98-113 and Exhibits 20A - 20H, 22A - 22F and 23)

11. Despite the cutback on production employees in 1974, the Company continued to hire and to promote employees into supervisory and managerial positions, into Sales and into various Office positions. (Plaintiffs' Exhibits 20, 21, 29, 31, 81a, 83, 84; Defendant Company's Exhibit 12)

12. The Company has not established any definite criteria for hiring employees in production jobs whether hourly paid or supervisory. The Company preferred high school graduates but this was not a requirement. Rather, hourly paid employees were provided a "reasonable" period within which they were trained or respective jobs. No established period was set for on-the-job training.

This same procedure was followed for supervisors in production. No educational requirement was established. Officers of the Company subjectively selected the employee or applicant they deemed best qualified and would provide on-the-job training for the employee selected. (Plaintiffs' Exhibit 23; Trial Transcript pp. 77-82, 261)

13. No objective criteria was established by the Company for Office employees, including sales. Officers of the Company tried to determine the best qualified

applicant and employee, transferring some production employees into sales and managerial positions. (Trial Transcript, pp. 203, 228-229)

14. Prior to the filing of this action, no black employee or applicant had been selected for a supervisory or managerial position or for sales. Applicants for employment and employees were selected for these positions by an all-white managerial and supervisory staff, pursuant to the subjective standards indicated above. (Plaintiffs' Exhibit 42, pp. 27-28, Trial Transcript, pp. 90-98, 171-179, 202, 214-215, 229, 249)

Individual Discriminatory Practices

15. Following plaintiff Holsey's transfer to Beef, he attempted to bid on better job positions in Beef but was discouraged by his supervisor. His supervisor discouraged him from bidding on promotion to

beef boner and primal cut (beef breakdown), suggesting that he would not like the position. He submitted a bid anyway and was promoted. He was thereafter harassed by being assigned additional job duties which white employees did not have to perform, was improperly disciplined and was denied assistance in training and in the performance of his job. Plaintiff Holsey filed numerous grievances about the harassment, several of which were subsequently adjusted by the Company. For example, the Company increased his pay by 45 cents per hour and provided a four hour daily guarantee following a grievance on August 19, 1974; he was compensated for 2 days on October 21 and 22, 1974, and for 1 day in February 1976, because of the Company's refusal to recall him from lay-off. The Company refused to allow him to grieve that he was being discriminated against because of race in 1974 and referred him to the EEOC.[4] (Trial Transcript, pp. 293-304,

357-365; Plaintiffs' Exhibit 14; Union's Exhibits 1-15)

16. Plaintiff Holsey attempted to exercise his Company or date of hire seniority in 1974 and subsequently, in order to avoid his lay-off in Beef. He attempted to bump into Sausage, a predominantly white department, but was denied this opportunity. (Trial Transcript., pp. 309-327, 688, 701-720, 794)

17. Pursuant to Section 15.7 of the Collective Bargaining Agreement, the Company provided opportunities for Beef employees on September 2, 1974, February 26, 1975 and February 24, 1976 to use their Company or date of hire seniority to bump junior employees in other departments. Senior employees were also allowed to bump in the interim. Although establishing 5 years seniority on December 1, 1974, plaintiff Holsey was not allowed to bump junior white employees in Sausage. He was advised that no employees junior to him were

working fulltime in Sausage and that he could only bump junior employees in Operations. (Trial Transcript, pp. 309-327, 688, 700-720, 784-794, 832-833; Plaintiffs' Exhibits 20A-20J)

18. The Company suggests* with respect to each bumping in 1974, 1975 and 1976, that senior employees could only bump a junior employee who was not on lay-off. According to the Company, work contingents for succeeding weeks were established on Wednesday of each week. For example, if 10 employees were needed in Beef, the 10 most senior employees were selected to work. The junior employees were placed on lay-off for the week and would be recalled in Beef based on their departmental seniority. They would not be recalled to other departments unless employees with departmental seniority in those departments were not available for work. In that event, employees on lay-off would be recalled based on their Company or date of

hire seniority. If the laid-off Beef employee chose, he could bump a junior employee in Sausage or Operations and establish seniority in Sausage or Operations. The former Beef employee would thereafter have no recall rights to Beef but would have temporary and permanent recall rights in the new department to which he or she was assigned. (Trial Transcript, pp. 688-770, 784-785; Plaintiffs' Exhibits 22A - 22F)

19. The Company has failed to offer any reliable evidence[5] that Sausage employees junior to Holsey were on lay-off and not subject to the bumping provisions of the Collective Bargaining Agreement. During the period in question, plaintiff Holsey was on lay-off 219 days. However, at least 4 Sausage employees, who were junior in seniority to Holsey, Bertha Cox (laid off 107 days), Dixie S. Wright (laid off 132 days), Joseph P. Newman (laid off 70 days) and Ulysses Phifer, Jr. (laid off 82 days), were allowed to work

during Holsey's lay-off.[6] The Company offered no credible evidence that these employees were "temporary replacements" within the meaning of Appendix I to the contract.[7] Thus, although Holsey had 5 years company or hire date seniority, he was not allowed to exercise his seniority on lay-offs in 1974, 1975 and 1976 to bump junior employees in Sausage.[8]

20. Holsey did not express an interest in a supervisory position or in Sales. He was not considered for either position although vacancies occurred during his employment. (Trial Transcript, pp. 347-348; Defendant Company's Exhibit 12)

21. Plaintiff Frazier similarly attempted to exercise his Company seniority after July 21, 1974, 5 years after the date of his employment, but was unable to do so. Like Holsey, Frazier was not allowed to bump into Sausage. He was limited to Operations and was unable to work in December, 1974, while junior white employees were allowed to work in

Sausage. (Trial Transcript, pp. 434-439)

Additionally, Frazier was interested in a supervisory position but was never selected. Defendant suggested that Frazier lacked aggressiveness but offered no reliable evidence of how Frazier's lack of aggressiveness was to be measured with the number of junior white employees who promoted over him to supervisory positions. (Trial Transcript, pp. 439, 760-768, 770-778, 824-829)

22. Plaintiff Drakeford began efforts shortly after his employment to promote to a supervisory position. He talked with his supervisor and the manager of his Department about his interest, but junior white employees were selected over him. Defendant offered no reliable[9] evidence to establish that the employees selected were more qualified or even equally as qualified as Drakeford. For example, Roof, a junior white employee was selected over Drakeford in July 1973. Roof

has less experience than Drakeford in the department, had no greater educational background and was demoted within 5 months because of his inability to perform supervisory responsibilities. (Trial Transcript, pp. 401-406, 408, 409, 747-777, 821-828)

Beginning in 1971, the Company instituted a trainee program for supervisors, limiting its consideration of applicants to college graduates. The following employees were selected between 1971 and the termination of the program in 1975:

C.E. Adams - hired 11-9-70; transferred to Sales in 7/72;

F.J. Bowden - hired 3-12-73; transferred to purchasing clerk's job in Office and subsequently resigned;

M.G. Brown - hired 7-30-73; discharged 11-30-74;

R.B. Clark - hired 11-7-71; discharged in

1974;

T.M. Harris - hired 1-7-74; discharged 12-14-74;

S.A. Long - hired 1-11-73; resigned 2-24-73;

J.H. Ortwein - hired 4-16-74; transferred to Company's Memphis facility on 11-4-71;

N.H. Thuemmel - hired 1-14-74; discharged 12-14-74.

(Company's Exhibit 12; Plaintiffs' Exhibits 29, 31 and 84; Trial Transcript, pp. 760-766) No black employee or applicant was selected for the program.

The Company made no effort to validate the criteria used in the selection of trainees and terminated the program after it was clear that the selection criteria were invalid. The candidates selected either terminated their employment before permanent assignment or shortly thereafter or were assigned to more challenging and income producing employment in

Sales or management. All of the 8 trainees left the Company except Adams and Ortwein. Adams was transferred to Sales and Ortwein to the Company's Memphis, Tennessee facility. (Trial Transcript, pp. 747-777, 820-828)

23. Between 1970 and January 1977, 19 employees were hired as supervisors; 7 promoted from within; 9 were hired as new employees, and 3 employees were transferred into foremen positions from other facilities. One of the 19 was employed from a closed competitor. No black was selected as a foreman during this period, although black employees constituted 25.11 percent of the Company's work force and several, including Drakeford, had expressed an interest in a foreman's position. Black candidates also constituted 14.66 percent of the outside available work force. By combining the internal and external availability, one would expect 8.25 percent black foremen as of January 1, 1977. No black, however, had been

assigned as a foreman. (Trial Transcript, pp. 540-570; Plaintiffs' Exhibits 81a - 81d)

24. Drakeford has a high school diploma (GED), one year of business training at Evans Business College in Charlotte and one and one-half years of mechanical training at Central Piedmont Community College in Charlotte. Additionally, he has worked for the Company in Operations, Beef and temporarily in Sausage. His performance evaluation was high. He was familiar with the Company products and operations and was qualified to perform the supervisor's responsibilities. He was passed over, between July 1973 and his promotion on February 28, 1977, on more than 8 occasions by junior white employees[10] with less training and experience. During this period the Company had no black supervisor. (Plaintiffs' Exhibit 15; Trial Transcript, pp. 160-162, 403, 408, 766-777, 821-828)

25. Drakeford was selected as a

supervisor on February 28, 1977, after the filing of his charge and 4 days before the filing of this action. He has not been compensated for any loss of income as a supervisor up until his February 28, 1977 promotion. Drakeford was the first black to be hired as a supervisor.

26. Following his promotion to supervisor, Drakeford was not assigned all supervisory responsibilities. The General Foreman, Melvin Potts, would grant leave to employees supervised by Drakeford without advising him. His day shift was assigned to a white supervisor.[11] Drakeford was put on a night shift beginning at 7:00 p.m. That shift was further altered, with Drakeford assigned to come in at 4:00 p.m. in order to accommodate another white supervisor. Drakeford was denied assistance which the Company provided other supervisors.[12] (Trial Transcript, pp. 405-407, 416, 751-753, 837)

27. Drakeford complained to his

superiors about the difference in treatment and harassment to which he was subjected but was accorded no relief. He requested a transfer but the request was rejected. Not being able to obtain relief and being subjected to degrading treatment, he left the Company's employ on November 28, 1978, but would like to return if assigned the supervisor's responsibilities, free of discrimination and harassment. (Trial Transcript, pp. 405-407, 751-753, 837)

28. Drakeford also requested employment as a salesman. He talked with the Sales Manager in 1975 and requested a sales position. He was advised that he would be considered for the next vacancy. (Trial Transcript, pp. 403-409)

29. No black employee or applicant had been hired as a salesman until after the filing of this action. Between 1971 and February 1977, the Company hired 15 salesmen, 2 from within the work force and 13 from

outside.[13] Production employees had also been transferred in or hired as salesmen. (Trial Transcript, pp. 540-570; Plaintiffs' Exhibit 81a-81d)

30. The Company has no written standards for selecting salesmen. Generally, the Company states that it looks for a high school graduate; a person who is honest, ambitious, neat in appearance, trustworthy, with a good personality and generally good all around. Selection of applicants is made by the Sales Manager with the Plant Manager making the final determination. Other managers and officials may have input. The determination, however, is by an all-white staff and based on the subjective standards indicated. (Trial Transcript, pp. 164, 171-177, 203-224, 229-255)

31. Applicants may submit applications for sales positions at any time during the business day or may complete applications after being selected. Drakeford was not

requested to complete an application and despite the assurance of the Sales Manager, Drakeford was never considered.

32. Blacks constitute 8.69 percent of the external available work force and 20.71 percent of the internal work force for sales positions.[14] The first black, Ennis Graves, was hired in sales on August 1, 1977. He resigned April 15, 1978. Virginia Davis, a black female employee, was employed as a sales clerk on December 27, 1976. Ms. Davis, however, did not have sales responsibilities. She terminated her employment on February 12, 1977. Thus, at the time of trial, no black among the approximate 32 employees were employed in sales. (Trial Transcript, pp. 210, 229; Plaintiffs' Exhibit 83)

33. Several black applicants and employees had requested assignment to sales. In addition to outside applicants and Drakeford, Thomas Brown, Dennis Williams, Henry Croutch and Laura E. Harvey requested

employment as a salesperson between 1975 and 1978. Defendant offered no evidence for the failure to employ either of these black applicants or other black applicants who applied during this period although vacancies existed and, with the exception of Graves, only white applicants were hired to fill the vacancies. (Trial Transcript, pp. 208, 214-215, 233, 244, 454, 468-484, 779-780)

34. Salesmen may be required to live and work in areas outside of Charlotte because of the territory served by the Company. Drakeford advised the Sales Manager that he was willing to locate in other areas. Drakeford was also experienced in and knowledgeable about the Company's products and operations, was honest, neat in appearance, able to communicate and was, under the criteria suggested by the Company, able to perform the duties as a salesperson. The same is true of Laura Harvey and there is no evidence that the other applicants identified

at trial were unqualified. (Trial Transcript, pp. 403-404, 468-484)

35. Linwood Edwards was initially employed by the Company in 1949 in Asheville, North Carolina. While at Asheville, he promoted to a supervisory position. (Trial Transcript, pp. 184-189)

36. Although Asheville was nonunionized, Edwards was experienced as a supervisor and was knowledgeable of defendant's operation and procedure. (Trial Transcript, pp. 184-189, 278-282)

37. The Asheville facility was closed in 1969 and Edwards was transferred to Mecklenburg County. Defendant's previous practice, which continued throughout the period of trial, was to transfer employees from closed facilities to others in basically the same job positions they occupied in the closed facility. For example, J. E. Davis and G. E. McClellan were transferred into Mecklenburg County as supervisors from closed

facilities. W. F. Myers was also transferred into the Mecklenburg facility as a supervisor from a closed facility. Edwards, however, was denied a supervisory position and assigned as a laborer (lugger loader). As indicated, the Company had no black supervisor until Drakeford's assignment in 1977, following his charge filed with EEOC. (Trial Transcript, pp. 184-189; Defendant Company's Exhibit 12)

38. After his transfer, Edwards requested promotion to or assignment as a supervisor. Although junior white employees were hired as and promoted to supervisory positions after Edwards' transfer, Edwards was denied assignment as a supervisor.

39. Edwards was qualified to be assigned as supervisor at the Company's facility. He was qualified to fill the position upon his transfer in 1969 as well as at the time of the vacancies occurring between 1971 and the time of trial. (Trial Transcript, pp. 282-283, 821-824)

40. Mynell Bennett, a black female, sought employment with the Company on July 16, 1971. She did not indicate a specific job position but was assigned to a job limited to women employees in the Sausage Department.[15] (Plaintiffs' Exhibit 18)

41. Under the Collective Bargaining Agreement then in effect, one had to work 30 days during a consecutive 60-day period in order to establish permanent status. One was classified as a probationary or temporary employee until establishing permanent status. (Plaintiffs' Exhibit 22a)

42. Probationary employees were called to work weekly or daily by their supervisor as needed. No standards had been established by the Company to govern the supervisor's discretion in calling probationary employees for work. (Trial Transcript, pp. 374-380, 662-674)

43. Ms. Bennett performed her job effectively and proficiently when called. In

August, 1971, the Company hired several white women[16] from the closed Swift & Company facility in Mecklenburg County. Although the former Swift employees were junior to Bennett and were also probationary, the former Swift employees were called in over Bennett. (Trial Transcript, pp. 374-380)

44. The Company also employed white high school students to work during the summer months. These students were also called to work over Bennett. (Trial Transcript, p. 379)

45. Bennett was unable to establish permanent status and seniority and, therefore, inquired in January, 1972, if the Company was refusing to call her because of her race or because of her work performance. She was assured that her work performance was acceptable and was later advised that she was being discharged. The Company offered no explanation for the termination of Bennett's employment. (Trial Transcript, pp. 379-380, 666-670)

46. The former white Swift employees established seniority in December, 1971. Bennett was never allowed to establish seniority although she was senior in date of hire to the former Swift employees.

47. Janie Hill, a black female, was employed by the Company on June 3, 1971. Hill was assigned to a female job in Sausage. Like Bennett, Hill was denied employment while junior white, former Swift employees and high school students were allowed to work and to establish seniority. Janie Hill was unable to establish seniority until March 1972. (Plaintiffs' Exhibit 69; Trial Transcript, pp. 389-395)

48. Junior white employees who were allowed to establish seniority over Hill included Sandra McAllister, Ann Long, Ruth English, Peggy Hicks and L. Purell.

49. Hill had also performed her job proficiently with no complaint about her work or explanation by the Company for allowing

junior white employees to work over her.

50. Defendant has offered no credible evidence that the junior white employees were able to perform the job responsibilities more proficiently or effectively than Bennett or Hill. In fact, the evidence demonstrates that Bennett and Hill were equally or more proficient or more entitled to preference because of their date of employment and performance ratings.

51. Bennett and Hill lost wages because of the Company's refusal to allow them to work and to establish seniority while junior white employees were allowed to do so.

52. Laura E. Harvey was employed by the Company on January 8, 1973, as a keypunch operator. Harvey was the first black in the Office. In 1979, she promoted to lead keypunch operator, a supervisory position, replacing a former white employee. Harvey, however, was not allowed to supervise the 2 white employees under her supervision. She

supervised 2 black employees; the white employees were supervised by the manager of Harvey's department because they did not wish to be supervised by a black person. Harvey complained and quit in March, 1979, but was re-employed in May, 1979, again as a lead keypunch operator but without supervisory duties. (Trial Transcript, pp. 462-484)

53. Between 1975 and the date of trial, Harvey applied for the following job positions: sales in 1976, 1977 and 1978; laboratory assistant in 1977; switchboard in 1976; and for a production job in Sausage in 1976. She was denied a sales position and a transfer to Sausage. A black employee was hired over her in the laboratory. She was advised that she would be trained on the switchboard but denied training until 2 weeks prior to trial. She was also required to work overtime after complaining about the Company's racial practices, more than other employees. (Trial Transcript, pp. 462-484; 780-784)

54. The Company offered no explanation for failing to allow Harvey to supervise the white employees in keypunching, for failing to hire or to transfer her into sales, for failing to train her on the switchboard or for requiring her to work overtime more than other employees.

55. As indicated, Harvey was qualified to work as a salesperson, to supervise keypunch employees and to operate the switchboard. Although the Company had vacancies in these positions, it offered no evidence to explain why Harvey was not selected.

Findings with respect to the class

56. Prior to 1965, the Company limited the employment and promotional opportunities of black applicants for employment and black employees to the warehouse (Operations) as laborers. After the effective date of Title

VII (July 2, 1965), a limited number of black employees were allowed to transfer into Beef and into Sausage. Holsey, Frazier and Drakeford were transferred into Beef in 1969 and 1970. (Trial Transcript, pp. 84-98, 160-166, 171, 202, 231-233, 293-298, 374-382, 389-395, 434-437, 450-454, 462-469; Plaintiffs' Exhibit 24, Answer to Interrogatory 6)

57. The first black women were hired in Sausage in 1969. (Trial Transcript, pp. 374-380, 389-395; Plaintiffs' Exhibits 20, 28a and 28b)

58. Prior to the charges filed by Holsey, Frazier and Drakeford in 1974, no black worked as a supervisor or in management. Harvey was the first black hired in the office in other than a janitorial position. (Trial Transcript, pp. 462-463) The Company filled these job positions by transfer, promotion or hiring of incumbent employees or by hiring new employees. Incumbent employees who were

interested in these positions were required, like applicants for employment, to fill out an application for employment. Incumbent employees who sought supervisory, managerial and office positions, including sales, were, therefore, like new applicants since they were given no preference over others; nor were they accorded any special status after employment in such positions which were not given to new hires. (Trial Transcript, pp. 37-38; 229, 249; Plaintiffs' Exhibit 16)

59. Between 1965 and the date of Drakeford's promotion to supervisor on February 28, 1977, the Company employed 37 supervisors. Twenty-seven were promoted from within; 10 were new hires. Two were transferred from closed Company facilities located outside of Mecklenburg County. One was hired from a closed facility of a competitor. (Trial Transcript, pp. 474-477, 820-828; Plaintiffs' Exhibits 21, 81a, 83 and 84)

60. During this period, black employees constituted 25.11 percent of the Company's internal available candidates and 14.66 percent of the outside available job market. No black was hired. (Trial Transcript, pp. 540-570; Plaintiffs' Exhibits 81a, 84)

61. Between 1971 and Drakeford's promotion in 1977, the Company hired or promoted 19 employees to supervisory positions. Again, no black was employed.

62. The hiring sample of supervisors during the period 1971 until 1977 is not large enough to establish a reliable statistical pattern.[17] Defendant's practices from 1965 through 1977, however, demonstrate a total exclusion of black applicants and employees from the rank of supervisor although qualified applicants and employees were available for such positions. Additionally, Linwood Edwards was not allowed to transfer into the Company facilities on the same conditions as white supervisors from closed facilities. (Trial

Transcript, pp. 184-189, 540-570)

63. The number of black applicants and employees who have been adversely affected by the Company's practice with respect to supervisors is not known. The practice was sufficiently pervasive and widely known to affect all black employees of the Company and qualified blacks in the relevant job market to make them too numerous for joinder in this proceeding. Additionally, because all of the victims are not presently known, joinder would be impracticable.[18]

64. No black was hired in Sales by the Company until Ennis Graves' employment on August 1, 1977, more than three years after plaintiffs' charges were filed with EEOC. Between 1965 and Graves' employment, the Company hired 64 salesmen, 32 from outside and 32 promoted or transferred from within. Twenty-three salesmen were hired or promoted between 1971 and the date of trial. Only one black has been hired as a salesman although

blacks constituted 8.69 percent of the external and 20.71 percent of the internal available job market. (Trial Transcript, pp. 211-214, 231-236, 540-570; Plaintiffs' Exhibits 81a and 84)

65. The number of salesmen hired between 1971 and the date of trial is not large enough to draw any statistically significant conclusions.[19] (Trial Transcript, pp. 540-570) Defendant's total exclusion of blacks from sales positions, however, with the exception of Graves, was sufficiently pervasive and was well known. Although qualified black applicants existed and several, including Drakeford, applied, no black was hired until 3 years after plaintiffs' charges in 1974 and the institution of this action. All of the blacks affected by the Company's practices in hiring salesmen are not known. The number affected, however, is sufficiently large to make joinder impractible.[20]

66. Laura Harvey was the first black hired in the office. (Trial Transcript, pp. 462-469) Although qualifications for Sales differ from some of the other Office jobs, black exclusion from office jobs was implemented by the same basic practice, namely defendant's refusal to hire or promote a black into any office job because of race.

67. In being denied employment as a supervisor and as a salesman, Drakeford was affected by the same practice which excluded black employees and applicants from sales and supervisory positions as well as from other Office positions. There was and is no conflict in Drakeford's position and that of other incumbent employees or that of outside applicants for employment who wish to be assigned or promoted to or hired as a supervisor, salesman or as a salaried employee. Incumbent black employees and black applicants were treated in the same way and no preference or different status was accorded

one because of his employment with the Company.

68. The factual questions raised by the claims of plaintiff Drakeford and of other black applicants for employment and employees desiring supervisory and Office positions are basically the same. Drakeford and the class have demonstrated that race was the basis for the exclusion of blacks from supervisory and Office positions.

69. The claims of Drakeford and of the class are typical. The Company has suggested some objective criteria for selection of salesmen and supervisors. These standards have been applied by an all-white staff. No effort was made to establish job relatedness of whatever standards were employed. The result has been the total exclusion of blacks from sales and supervisory positions until after plaintiffs' charges. The evidence demonstrates that Drakeford and other blacks were qualified for the positions but not

employed or promoted.

70. Plaintiffs are adequate representatives of the class. Plaintiffs have been affected by the same practices which have excluded other blacks from supervisory, sales and Office positions. After complaining about defendant's practices, plaintiffs, including the intervenor, were subjected to harassment and intimidation. They are represented by competent counsel who are experienced in litigating class action, employment discrimination cases and have demonstrated their willingness and ability to represent the class adequately and effectively.

71. This proceeding has demonstrated that a class action is preferable to a number of separate trials raising the same factual issues. The time and convenience of the Court and the time of and costs to the parties are best served by a single class action proceeding.

Claims against the Union defendants

72. The Union defendants have no responsibility or authority with respect to the hiring of production employees or the hiring or promotion or transfer of employees to supervisory, managerial or office job positions.

73. The Company administers the seniority provisions of the Collective Bargaining Agreement. It determines which probationary employees to recall in order that they might establish a seniority date.

74. Except for the harassment of Holsey and Frazier and the Company's refusal to allow them to exercise their plant seniority to bump junior white employees, the Union defendants had no responsibility for the discriminatory practices found with respect to the plaintiffs and the class. The Union grieved and discharged its responsibility regarding the harassment of Holsey and Frazier in attempting

to use their plant seniority and of Bennett in attempting to establish seniority.

Injuries suffered by the plaintiffs and certain identified class members

75. Plaintiff Holsey sustained loss of income during 1974, 1975 and 1976 because of the Company's refusal to permit him to establish seniority in Sausage. Additionally, he has been subjected to harassment and intimidations because of his efforts to challenge the Company's employment practices.

76. Plaintiff Frazier lost two weeks in wages during December of 1975 because the Company called in junior white employees over him. He was not allowed to establish seniority in Sausage. (Transcript, pp. 434-439) He was also harassed because of his efforts to obtain relief under Title VII.

77. Plaintiff Drakeford was denied employment as a foreman between 1973 and

February 28, 1977. He was also denied a sales position beginning in 1975. He sustained loss of income as a result of the Company's practices. Drakeford was also subjected to harassment and intimidation following his assignment as a foreman and was forced to leave his employment with the Company on November 28, 1978, and has sustained loss of income as a result.

78. Linwood Edwards was continuously denied assignment as a supervisor following his transfer to Mecklenburg County in 1969. He was more qualified for the supervisory positions filled in 1973 and 1976 than the white employees selected. Edwards has sustained loss of income because of the Company's practices.

79. Mynell Bennett and Janie Hill were denied the opportunity to establish seniority during 1970. Junior white employees, with no more or less qualifications, were called to work over them. Bennett complained about the

discriminatory practices and was discharged on January 14, 1972. Hill was unable to establish seniority until March, 1971.[21] Bennett and Hill lost income because of the Company's discriminatory practices.

80. Laura Ellen Harvey was denied job duties and pay in 1979 as an office supervisor because of her race. She was discriminatorily denied employment in Sales although qualified and was harassed and retaliated against after she complained about the Company's racial practices. Harvey lost income because of the Company's practices.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action and of the parties to this proceeding under Title VII, 42 U.S.C. §2000e et seq. Holsey, Frazier and Drakeford filed charges of discrimination with EEOC on March 4, 1974, obtained a right-to-sue letter and timely

instituted this proceeding under Title VII, 42 U.S.C. §2000e-5; Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Intervenor Bennett also exhausted the administrative requirements of Title VII and timely moved and was allowed to intervene. Braxton v. Virginia Folding Box Co., 72 F.R.D. 124 (E.D. Va. 1976). However, since Bennett's complaint was filed more than 3 years following her discharge, she is limited to relief under Title VII. Holsey, Frazier and Drakeford may maintain this proceeding under 42 U.S.C. §1981.

2. The Court previously conditionally certified this action as a class action under Rule 23(b)(2) and (3) and defined the class as all black applicants for employment and black employees of the Company's Mecklenburg County, North Carolina facility who have been adversely affected, at any time since July 27, 1971 (6 months prior to Bennett's charge filed with EEOC), by the Company's racially

discriminatory employment practices. After reviewing the conditional class certification following trial, Stastny v. Southern Bell Tel. & Tel. Co., ____F.2d ___, 23 FEP Cases 665 (4th Cir. 1980), the Court reaffirms and finalizes class certification.

More than 40 to 60 black employees of the Company annually and 20 black applicants for employment have been affected by the Company's practices. Hill v. Western Electric Co., 596 F.2d 99, 102 (4th Cir.), cert. den., 444 U.S. 929 (1979), limits an employee's standing to represent applicants for employment:

> The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring.

The instant proceeding is quite different from Hill. Drakeford sought employment as a supervisor and salesman. His request or application, although as an employee, placed

him in no different standing than an applicant for employment. He is given no greater status for consideration as a supervisor or salesman because of his employment than a non-employee applicant. If selected, he is treated the same as a new employee. Thus, unlike Hill, Drakeford has no antagonistic interests to applicants for employment and his claims are typical to those of the class. Stastny supra, 23 FEP Cases 670:

> In disparate treatment theory, this [the commonality claim] is the "pattern or practice" followed as an employer's "regular or standard operating procedure," which so demonstrably treats women [here blacks] in relatively unfavorable ways that it justifies a rebuttable inference that it proceeds from an intention to treat them differently simply because of their sex [here race].

See also, Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 39-45 (N.D. Cal. 1977). Drakeford has demonstrated that the Company's criteria and procedure used in selecting supervisors, salesmen and other

Office employees have been consistently employed to exclude black employees and applicants; that the practice has been pervasive and has unfavorably affected a number of black candidates, making impractical their joinder.

The claims of plaintiffs and of the class raise common questions of law and fact. The claims of the plaintiffs are also typical of those of the class. Plaintiffs have demonstrated that over an extended period the Company totally excluded black applicants for employment and employees from supervisory, sales and other Office positions solely because of race. No changes were made in this practice until after plaintiffs complained to EEOC and instituted this proceeding. The Company failed to articulate a reasonable non-racial basis for its action. Plaintiffs have accordingly demonstrated a "uniform pattern and practice" by the Company which impacted unfavorably upon black applicants for

employment and employees. Harriss, supra; Stastny, supra.

Plaintiffs are and have been adequate representatives of the class and have fairly and adequately represented the class' interests.

This action also satisfied the requirements of Rule 23(b)(2) and (3). The Company has refused to hire or promote black candidates to the positions in question solely because of race. To remedy this practice, final declaratory and injunctive relief is appropriate. Back pay and individual injunctive relief are also necessary. However, common questions of law and fact predominate and class treatment provides a more appropriate, efficient and effective means for final resolution of this action.

3. The time period covered by this action is July 27, 1971, through the date of trial. Bennett filed her charge on January 27, 1971, alleging that the Company had

followed a pattern and practice of excluding blacks, including her, from certain job positions and that she had been retaliated against because she complained to the Company about its racial practices. Her charge sufficiently raised issues of racially discriminatory hiring, job assignment, selection for supervisory and Office positions and retaliation because of efforts to utilize Title VII. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976); EEOC v. Western Pub. Co., 502 F.2d 599, 602-603 (8th Cir. 1974). Since her charge is the earliest of those involved here, the Court properly uses it as the basis for establishing the beginning period of liability, Russell v. American Tobacco Co., 374 F. Supp. 286 (M.D.N.C. 1973), modified in part and aff'd in part, 528 F.2d 357 (4th Cir. 1975), cert. den., 425 U.S. 935 (1976), and under 42 U.S.C. §2000e-5(e), discriminatory acts occurring

within 6 months prior to her charge (July 27, 1971) may appropriately be raised. Wilhite v. South Central Bell Te. & Tel. Co., 426 F. Supp. 61 (E.D. La. 1976). However, claims under 42 U.S.C. §1981 will date back three years prior to the filing of this action, or March 4, 1974.

4. The class is, therefore, defined as all black applicants for employment and black employees who have been denied employment or otherwise discriminated against by the Company because of race at any time since July 27, 1971. No class is defined as to the Union since the discriminatory practices which unlawfully affected the plaintiffs and the class were imposed exclusively by the Company.

5. Plaintiffs may establish a violation of Title VII or 42 U.S.C. §1981 by either showing discriminatory impact of racially neutral practice which adversely impact on black applicants for employment or discriminatory treatment by an employer or

other party covered by Title VII in providing employment opportunities for black candidates. For discriminatory treatment, plaintiffs must also show motive or intent. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell-Douglas Corp. v. Greene, 411 U.S. 792 (1973); EEOC v. Radiator Specialty, 610 F.2d 178 (4th Cir. 1979). Under either theory, plaintiffs may employ statistics. Teamsters, supra at 336.

6. Plaintiffs here have proceeded under the disparate treatment theory. They must demonstrate, therefore, that defendants have consistently followed a pattern and practice which demonstrably treated black applicants for employment and black employees relatively unfavorable, thus justifying a rebuttable inference that the defendants proceeded "from an intention to treat [black candidates] differently simply because of their. . .

[race]," Stastny, supra, 23 FEP Cases at 670; Teamsters, supra at 336, or that the facts establish violations under McDonnell-Douglas Corp., supra at 802-803 -- (a) that black candidates have sought employment, (b) that they were qualified for the positions they requested, (c) that vacancies existed, and (d) that the defendants filled the vacancies with white employees with less or no greater qualifications than the blacks. Plaintiffs may also use a variation of the McDonnell-Douglas approach. See Teamsters, supra.

7. If plaintiffs present a prima facie case under either approach, they establish a rebuttal presumption of liability which requires that the defendants "articulate" a reasonable non-racial basis for its action. Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Kunda v. Muhlenbenberg College, 22 EPD ¶30,674 (3rd

Cir. 198); Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979).

8. Plaintiffs have demonstrated a consistent pattern and practice of the Company in limiting black candidates to certain job positions, of totally excluding them from supervisory, sales and managerial jobs and in treating them differently than white applicants and employees. Initially, blacks were limited to the Company's Operations Department, principally as laborers. A limited number of black employees were allowed to transfer to other production departments after the effective date of Title VII but discouraged from seeking assignments to higher paying jobs. No black was employed as a supervisor, in sales or in a managerial job. The first black was employed in the Office in 1973. No change was made in this practice until after plaintiffs' charges of discrimination. Such belated changes do not eliminate or explain the Company's total

exclusion of blacks from the better job positions. See United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 151-152 (6th Cir.), cert. den., 400 U.S. 943 (1970); Barnett v. W. T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

The evidence also demonstrates that black candidates were available and qualified for and actively sought the positions in question, that vacancies existed but that the Company selected white candidates with no greater qualifications or less qualifications than the black candidates.

The evidence, therefore, establishes a prima facie case of liability that blacks as a group were denied certain job positions and treated differently solely because of race. McDonnell-Douglas Corp., supra.

9. Faced with the rebuttable presumption of liability, the Company failed to offer a reasonable explanation. It indicated general, subjective criteria for

employment. For example, it imposed no educational requirement for employment in hourly job positions in production. Selection of employees was left to the general discretion of supervisors, an all-white staff. Such practices, with the attendant exclusions or limitations of black candidates, support the inference that black candidates have been denied employment solely because of race. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972), cert. den., 444 U.S. 982 (1972); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).

General selection criteria were also employed in hiring salesmen, supervisory and office employees. Again, an all-white staff made the employment decisions, resulting in the total exclusion of black candidates. Brown, supra; Rowe, supra.

Closer analysis of the Company's explanation further demonstrates its pretextuality. In instances where experience

was suggested as the basis for selection, the Company's witness, when faced with a black candidate being passed over with more experience, admitted that he was wrong.[22] In some other instances, the Company allowed that it had no explanation.[23] This same witness was relied upon by the Company for basically all of its explanations of the disparaties. His admitted misrepresentations, his decorum and the documentary evidence simply made his testimony unreliable and the Court refuses to accept it. And while the Company need only offer a reasonable, non-racial explanation for its practices and does not assume the burden of proof, it has failed to provide even a reasonable explanation. See Sweeney on remand, 604 F.2d 106 (1st Cir. 1979).

10. Plaintiffs' prima facie case is thus unrebutted, see Stallings v. Container Corp., 75 F.R.D. 511 (D. Dela. 1977); United States v. Commonwealth of Virginia, ___F.2d ___ (4th Cir. Nos. 78-1764, 78-1765 and 78-1840, April

17, 1980), and the Court is persuaded that plaintiffs have carried their burden of establishing liability.

11. Once a pattern and practice of employment discrimination is established, the Court should evaluate the individual claims against that background. Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978).

12. Mynell Bennett and Janie Hill applied for employment with the Company in 1971. The first black females had been hired by the Company in 1969. White women had been employed before 1969 but all women were relegated to women jobs under defendant's A, B and C[24] job classification system, now abandoned.[25] Bennett and Hill were considered only for women jobs. They were not allowed to establish seniority.[26] Rather, the Company employed white employees, junior to Bennett and Hill, and allowed the white employees to establish seniority over Bennett and Hill. The Company suggested that the white employees

had gained experience at a competitor. Plaintiffs demonstrated, however, that they had acquired experience at the Company and had successfully performed their jobs. No evidence was offered to show that the white employees were able to perform the various jobs more efficiently or effectively than plaintiffs. The only reasonable conclusion the Court can draw from the facts established is that the white employees were simply given preference over Bennett and Hill because of race. McDonnell-Douglas Corp. v. Greene, supra. This conclusion is further buttressed by the fact that white high school students, with no experience, were also given preference over Bennett and Hill during the period that Bennett and Hill were attempting to establish seniority. The Company offered no explanation for this preference.

13. Bennett complained about the preference being given to white employees. The next day, without any notice, the Company

advised the North Carolina Employment Security Commission that Bennett was being discharged because, as a probationary employee, she "did not prove satisfactory." Bennett had just been assured by the Company that her work was satisfactory. Moreover, in other instances where employees had challenged practices of the Company as racially discriminatory, the Company had retaliated against them.[27] Viewed against the Company's historical discriminatory practices, the Court concludes that Bennett was discharged in violation of her rights under 42 U.S.C. §2000e-3(a) (Section 704a) of Title VII.[28] Even independently of the historical background, the Company's discharge of Bennett violates Section 704(a). Berg v. LaCross Cooler Co., 612 F.2d 1041 (7th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Hylands v. Kenner Products Co., 13 EPD ¶11,427 (S.D. Ohio 1976).

14. Holsey and Frazier have shown that

they were intentionally treated differently in their efforts to exercise their seniority rights after 5 years of employment. Article XV, Section 15.7 of the Collective Bargaining Agreement than in effect[29] permitted an employee with 5 or more years of seniority to use his date of hire seniority to bump junior employees across departments in the event of lay-offs. The Company was to establish its work compliments for each department weekly, "no later than Thursday noon."[30] In the event of lay-off, the Company was to use its bumping rosters[31] to select the most senior employee on lay-off to bump junior employees in other departments. An employee on lay-off in another department, even though working temporarily, could not be bumped.[32]

After Holsey and Frazier, who were assigned to Beef, established 5 years of continuous employment, they sought to bump employees in Sausage who were junior to them. Neither was allowed to do so. The Company

offered several explanations, neither of which the Court finds reliable.[33]

The Company indicated that Holsey and Frazier refused to bid into Sausage between 1971 and 1973 although vacancies existed. However, during this period, Holsey and Frazier were permanently assigned to jobs in Beef which paid more than the Sausage jobs. Additionally, there was no requirement that one first attempt to bid into Sausage before one could bump there after establishing 5 years continuous company seniority. Holsey was out sick during a part of 1975 and 1976, but was available for work and did work in Operations as a cleaner during a part of the period. No explanation was offered, for example, for not allowing Holsey to bump into Sausage between December 1974 and May, 1975. The Company suggested that no employee worked in Sausage during 1975 and 1976 on a permanent basis who was junior to Holsey, but the record demonstrates that several white employees who

were junior to Holsey worked basically continuously in Sausage during the period.[34] Even if the Company classified them as "temporary," it was only through subterfuge to force Holsey and Frazier to go to Operations and to allow the junior employees in Sausage to work.

Moreover, Holsey and Frazier have shown a continuous practice of harassment by the Company because of their efforts to challenge the Company's racial practices. The Company attempted to discourage Holsey from bidding on job positions in Beef. He bidded anyway and was assigned but then was required to perform duties not imposed on the previous white employees; he was not called to work properly or paid his correct salary.[35] He was unfairly disciplined.

Additionally, the Company had historically limited the assignment of black males to Sausage. The first black women were employed in Sausage in 1969 and the first

black male in 1976.[36]

Viewed against this background, the Court concludes that Holsey and Frazier were prohibited from establishing seniority in Beef because of their race and because of their efforts to exercise rights under Title VII.

15. Drakeford actively sought employment as a supervisor and in sales but was denied both positions until after he filed charges with EEOC. Drakeford has demonstrated that he was treated differently solely because of his race. Vacancies in supervisory positions existed in 1973 and 1976. Junior white employees were selected although Drakeford was more qualified and experienced than the white employees selected. Defendant's explanation is clearly pretextual.

Defendant suggested that Drakeford needed more experience. He was more experienced, however, than the employees selected in 1973 and 1976, including the supervisory trainees employed during this same period. Drakeford

was promoted after his charge and 4 days before this action was filed with no additional training.

The supervisory trainees were college graduates but, as admitted by defendant, no such training was necessary to perform the job. In fact, defendant abandoned the requirement because college trained employees simply found the work unacceptable for their degree of training. The college degree requirement impacted adversely on black applicants and was not job related. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The trainees also filled vacancies for which Drakeford was qualified. Several of the trainees were later permanently assigned as supervisors and some subsequently as salesmen and managers.

The Company's employment of Drakeford as a supervisor after his charge does not refute the clear evidence that he was denied

employment as a supervisor because of his race before his promotion. Barnett, supra.

Drakeford was also denied employment in sales in 1975 and thereafter because of his race. He applied for sales, was a protected employee under Title VII, was qualified, a vacancy existed but the Company employed white employees with no greater qualifications than Drakeford. McDonnell-Douglas Corp. v. Greene, supra. The Company failed to offer any credible evidence in explanation of its refusal to employ Drakeford in sales, nor for its failure to employ any black in sales until after this action was filed. The Company employed subjective employment criteria by an all-white staff which resulted in the total exclusion of black candidates.

After Drakeford's assignment as a supervisor, he was denied equal status and job duties and was subjected to harassment. Company officials knew of these practices since they were brought to their attention by

Drakeford but failed to take appropriate steps to have them eliminated. The employment conditions imposed by the Company forced Drakeford to terminate his employment in violation of Section 704(a). Sherrill v. J. P. Stevens & Co., 410 F. Supp. 770 (W.D.N.C. 1975), aff'd 551 F.2d 308 (4th Cir. 1977); cf. DeGrace v. Rumsfeld, 22 EPD ¶30,621 (1st Cir. 1980); Calcote v. Texas Educational Foundation, 578 F.2d 95, 97-98 (5th Cir. 1978); Young v. Southwestern Savings & Loan Ass'n., 509 F.2d 140 (5th Cir. 1975).

16. Linwood Edwards was denied employment as a supervisor because of his race. Unlike white employees who were allowed to transfer from a closed unit in their same job position, Edwards was denied this opportunity and continued to be denied employment as a supervisor thereafter. Defendant's witness who attempted to explain the Company's action admitted that there was no explanation. Additionally, defendant had

denied supervisory positions to all black candidates until after plaintiffs' charge. Edwards has established clear entitlement to relief under McDonnell-Douglas Corp. v. Green, supra and Sweeney, supra.

17. Laura Harvey, employed in 1973, was the first black employed in the office. She was promoted to a supervisory position in 1979 but prevented from supervising white employees simply because they did not wish to be supervised by a black person. Defendant's practice in this regard clearly violates Title VII, 42 U.S.C. §2000e-2(a). See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972), cert. den., 406 U.S. 957 (1972). Under these conditions, Harvey was forced to terminate her employment in March 1979, but was rehired in May, 1979 without being subjected to the same conditions. All supervisory duties were transferred to the head of her department. Calcote supra.

18. Harvey also sought employment in

sales in 1975 and thereafter. She was qualified for the position and vacancies existed. The Company denied her employment in sales because of her race. McDonnell-Douglas Corp. v. Greene, supra.

19. Harvey complained about the Company's racial practices and was subjected to harassment. She was denied training on the switchboard and assigned extra duties. No explanation was offered by the Company for these practices and in view of its consistent practice of harassing and intimidating black employees who sought to exercise their rights under Title VII, the Court concludes that Harvey was also deprived of rights under Section 704(a). Berg v. LaCross Cooler Co., supra.

20. The discriminatory practices established by the record have been implemented exclusively by the Company. The union defendants have and have had no responsibility with respect to hiring, initial

job assignments, or promotions, except to ensure that they are carried out in production pursuant to the Collective Bargaining Agreement. Supervisors, salesmen and other office employees have been selected exclusively by the Company. Where employees, including Holsey and Frazier, have been denied rights under the collective bargaining agreement, the Union has sought to challenge the practices by grieving. The Court finds and concludes that the evidence fails to demonstrate any act or conduct on the part of the Union which violate Title VII or 42 U.S.C. §1981. The Union is not a necessary party to effectuate relief to which the plaintiffs and the class are entitled. See Teamsters, supra at 356 and n. 43.

21. Having found that the Company has engaged in practices which violated Title VII and 42 U.S.C. §1981, the Court must now devise an appropriate remedy. The remedy should, so far as possible, place the plaintiffs and the

class in the position they would have occupied in the absence of the discriminatory practices established by this record. Albemarle Paper Co. v. Moody, supra at 421-422:

> It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Frank v. Bowman Transportation Co., 424 U.S. 747, 763, 771 (1976).

> "To effectuate . . . [the] 'make whole' objective, Congress in §706(g) [42 U.S.C. §2000e-5(g)] vested broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . ., or any other equitable relief as the court deems appropriate'. . . .
>
> "No less than the denial of the remedy of back pay, the denial of seniority [and other equitable] relief to victims of illegal racial discrimination . . . is permissible only for reasons which, if applied generally, would not frustrate the

> central purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'"

22. Plaintiffs and members of the class have sustained losses of pay as a result of the Company's discriminatory practices. They are entitled to be made whole and the Court knows of no reason to deny back pay relief in this case. Albemarle Paper Co. v. Moody, supra. Plaintiffs and the class should also receive front pay -- future pay at the rate of the positions they were wrongfully denied -- until they are placed in a job of equal or higher pay. Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976).

23. Plaintiffs and the class are also entitled to injunctive relief, enjoining the Company for continuing racially discriminatory hiring practices, including sales and supervisory positions, from administering the seniority provisions of the collective bargaining agreement in a racially

discriminatory manner, from denying equal terms, status and conditions of employment to blacks employed as supervisors and from retaliating against or harassing or intimidating black employees who seek to exercise rights under Title VII. Franks v. Bowman Transportation Co., supra; Barnett v. W. T. Grant Co., supra.

24. Class members who have been denied employment in sales and supervisory positions are entitled to injunctive relief directing that they be placed in such positions at the first appropriate vacancy. Franks v. Bowman Transportation Co., supra. "Bumping" or displacement of incumbents in these positions is not permissible. Patterson v. American Tobacco Co., supra at 267-269. Rather, class members will be awarded front pay until they can be placed in their rightful position. Ibid.

25. Since the Court has found class discrimination in hiring in supervisory and

sales positions, class members are presumptively entitled to back and front pay and an order directing that they be employed at the next vacancy. In order to demonstrate individual entitlement, a class member need only show that he or she is a member of the class who actively sought or would have sought[37] employment in Sales or as a supervisor and provide, at the relief stage of this proceeding, information regarding his or her loss of income. Teamsters, supra, 361-371; Sledge v. J. P. Stevens & Co., supra at 637-638.

26. Plaintiffs and several class members testified at trial. These individuals have established their entitlement to relief. Holsey and Frazier are entitled to injunctive relief and loss of pay for the time they were unable to work while employees junior in seniority to them were allowed to work in Sausage in 1974 for Holsey and Frazier and 1975 and 1976 for Holsey. Drakeford is

entitled to injunctive relief, including an order directing his reinstatement as supervisor free of the discriminatory conditions and for back pay as a supervisor from July 30, 1973 through February 28, 1977, the date of his employment as supervisor and from November 28, 1978, until he is reinstated. He is also entitled to loss of pay as a salesman from 1975 until he is employed in Sales but any recovery for loss of pay as a salesman must be offset by any recovery for loss of pay as a supervisor. Bennett and Hill are entitled to injunctive relief, including the seniority date they should have received but for the discrimination, and to back pay from June, 1971 through the present for any day they lost pay while employees hired after Bennett and Hill in Sausage were allowed to work. Edwards is entitled to injunctive relief, including an order directing that he be employed as a supervisor in production at the next vacancy

and to back and front pay from July 30, 1973, until he is so employed. Harvey is entitled to injunctive relief, including an order directing that she be employed in Sales at the next vacancy, and to back and front pay as a salesperson from 1975 until she is employed in Sales.

27. A master will be appointed with appropriate instructions to recommend the exact individual relief to which the plaintiffs and the class members are entitled. UTU v. Norfolk & Western Ry. Co., 532 F.2d 336 (4th Cir. 1975); Sledge v. J. P. Stevens & Co., supra.

28. Plaintiffs, as prevailing parties, are entitled to their costs, expenses and reasonable attorney fees. 42 U.S.C.

§2000e-5(k); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); 42 U.S.C. §1988.

This 13 day of March, 1980.

s/James B. McMillan
United States District Judge

Footnotes

1 With a merger following the filing of this action, the name of the Union was changed to United Food and Commercial Workers International Union, AFL-CIO, and Local 525, United Food and Commercial Workers International Union, AFL-CIO. See Order of July 2, 1979.

2 The Court found "very little indication in the record that defendant unions might be liable under any theory" but felt that outright dismissal would be "inappropriate at this preliminary stage."

On May 22, 1979, the Court denied the Company's motion for reconsideration of the class certification order and for certification of the order for appeal under 28 U.S.C. §1292(b). The Court found that the evidence amply supported the order and that certification under §1292(b) would not "materially advance the conduct of the action." Additionally, the Court found no irreparable injury to defendant since the Court would again consider the conditional class certification following the hearing on the merits which was to take place within a few months.

3 By Order of February 9, 1979, the Court partially allowed the Company's motion to dismiss. The individual claims of intervenor Bennett based on 42 U.S.C. §1981 were dismissed as untimely. However, the other motions of the Company to dismiss and for partial summary judgment were denied. Pending or renewed motions of the defendants will be disposed of herein.

4 The Company strenuously denied that Holsey was discouraged from bidding to promote in

Beef or that he was harassed after doing so. The Court has carefully reviewed the conflicting testimony and documentary evidence and resolves this controversy in favor of the plaintiff. Defendant's denials and explanation simply are not credible.

* See Footnote 5, infra.

5 Much of the evidence involved in this proceeding is in conflict and require a determination by the Court of whose testimony or exhibits to believe. See footnote 4, supra. Defendant's justification for limiting Holsey's bumping rights to Operations is based exclusively on the testimony of Paul Gibson, the Manager of Operations. The Court has carefully reviewed Mr. Gibson's testimony and demeanor as well as the documentary evidence and finds the explanation offered by Mr. Gibson to be unreliable and inconsistent with the documentary evidence, including the collective bargaining agreements, the seniority rosters, the daily work force contingents and the Company's exhibits.

6 Phifer is black. He was not active like Holsey, however, in challenging the Company's discriminatory practices. In restricting Holsey's bumping rights, the Company was following a consistent pattern of retaliating against Holsey because of his efforts.

7 "Employees working as temporary replacements hired on a day-to-day basis... are not subject to bumping. As a matter of clarification an employee hired as a temporary replacement in his own department is to be laid off in preference to

employees who have bumped into this department when the need for temporary replacement no longer exists." Plaintiffs' Exhibit 22E, Collective Bargaining Agreement for 1973-1976, p. 74.

[8] Holsey was advised that he could bump junior employees in Operations. The same opportunity was extended to Bowen, a white employee. Bowen, however, wanted to transfer to Operations. Holsey preferred to transfer to Sausage because the work was not as physically demanding and he had suffered an injury to his back.

[9] See footnotes 4 and 5, supra.

[10] M. G. Brown, T. M. Harris, S. A. Long, J. H. Ortwein, R. Q. Roof, J. W. Rose and N. H. Thummel.

[11] Drakeford was hired to replace Gary McClellan, a white supervisor on the day shift.

[12] Drakeford's testimony with respect to his treatment after promotion to supervisor was also disputed by the Company. The Court has reviewed the documentary evidence and the conduct and testimony of the parties and finds Drakeford's testimony much more creditable.

[13] Between 1965 and 1977, 64 employees worked in Sales; 32 of them came from within the Company's labor force. Eighteen of the 32 were initially hired as operatives; 11 of those moved directly from operative positions into Sales. (Trial Transcript, pp. 543-545)

[14] This finding is based on the analyses and testimony of plaintiffs' consultant.

(Trial Transcript, pp. 540-570) The Company has selected salespersons externally and internally (50 percent of the 64 employees working in Sales since 1965 have promoted from within). Some have had prior sales experience - 18 of 32 hired from the external market; others, however, have had no prior sales experience. (Plaintiffs' Exhibit 81d) Based on the Company's hiring practices and considering the employment of blacks in Sales from the 1970 Census and the North Carolina Employment Security data, the Court finds and adopts the internal and external availability studies of plaintiffs' consultant.

The Company challenges plaintiffs' availability data and contends that its consultants' estimates of approximately 10 percent availability is more reliable. The Company's study, however is based on a static work force of employees as of December 31, 1977, with no consideration of the qualifications or work experience of employees selected by the Company. The Court has also evaluated the manner and decorum of the witnesses and finds the plaintiffs' availability and utilization data more reliable.

[15] At least until 1973 or 1974, defendant designated certain job positions in production as "A" jobs limited to men, "B" job positions limited to women and "C" job positions open to both men and women. Bennett was assigned to a "B" job. (Trial Transcript, pp. 82-83)

[16] Ann Long, Ruth English and Peggy Hicks.

[17] The Company's consultant indicated that although small, the sample indicated no

discrimination. For the reasons stated in footnote 14, supra, the Court is unable to accept this testimony.

18 In certifying the class, see Order of May 1, 1979, the Court found that the Company employed between forty and sixty black employees during each of the years since 1971. "The exact number of black applicants for employment is uncertain, but appears to be in excess of twenty. The Court finds that joinder of all class members would be impracticable." The Court reaffirms this finding as well as others made in the May 1, 1979 Order.

19 Again, the Company's consultant challenges this position, indicating that the data suggest no discrimination. For the reasons stated in footnote 14, supra, the Court refuses to accept this testimony.

20 See footnote 18, supra.

21 Company records indicate that Hill established seniority on December 20, 1971. The Court finds Hill's testimony more reliable. Hill was unable to work on a regular basis until after Bennett filed her charge in January 1972. although junior white employees, who established seniority in December 1971, were allowed to work through March 1972. Additionally, the Company's records are not consistent on seniority dates. Some, for example, show that employees established seniority on the date of hire, without working 30 days as required by the collective bargaining agreement. Others show seniority dates 30 or more days after hire. Moreover, the Company's records show that junior white employees were able to establish seniority before Hill. (Trial Transcript, pp.

819-820)

22 See Trial Transcript, p. 822:

"COURT: What were you telling us all about the feeble nature of Edwards' Asheville time for this morning?

"A: You asked me what I was telling him, sir, about Edwards' what?

"COURT: The gist of what you said this morning was that his time in Asheville didn't count for much because that wasn't unionized and that was one reason you picked Roof [a white employee].

"A: The crux of my conversation this morning, sir, was in fact that Linwood [Edwards] came from a real small unit, very few employees, and it was not under a master labor agreement contract.

"COURT: Where did Roof come from?

"A: He was originally hired into Charlotte, sir.

"COURT: So you decided against Edwards because he'd only had two more years of unionized plant than Roof, is that the gist of what you said, plus all the time he had at the non-unionized plant?

"A: That could be taken from what I said, yes.

"COURT: Doesn't make much sense, does it?

"A: No sir, it doesn't."

23 See, for example, Trial Transcript, p. 666 (witness does not know whether white

employees allowed to work in preference to Mynell Bennett and Janie Hill performed better than Bennett and Hill); p. 696 (witness does not know whether white employees in Sausage who were junior in seniority to Holsey were on lay-off during the time Holsey attempted to bump into Sausage so as to justify the Company's refusal to allow Holsey to bump into Sausage); p. 720 (witness made a mistake in stating that Holsey forfeited his bumping rights); p. 794 (witness cannot explain why Holsey was not allowed to bump into Sausage as of February 24, 1976, or thereafter); p. 820 (witness cannot explain why white employees hired after Janie Hill were allowed to establish seniority before Hill); p. 837 (witness did not check to see if Drakeford continued to be harassed after complaining). See also Trial Transcript at pp. 160-166 (witness did not talk to black employees about interest in sales or supervisory positions until after charges were filed with EEOC although the Company followed a practice of inquiring of white employees and selecting them for such positions without initial applications; witness cannot explain total exclusion of blacks from sales and supervisory positions); pp. 208-215 (witness cannot explain exclusion of blacks from sales although he hired 10 salesmen between 1973 and 1979; he interviewed at least one black and doesn't know why he was not hired); p. 244 (witness black and doesn't know why he was not hired); p. 244 (witness did not compare whites he hired in sales in sales with black applicants).

24 "A" jobs were limited to men; "B" jobs were limited to women, "C" jobs were for either sex.

[25] No sex claim is raised here as this practice was eliminated in 1973 or 1974. (See Trial Transcript, pp. 82-82)

[26] A new employee under the Collective Bargaining Agreement, was required to work 30 days during a consecutive 60 day period in order to establish seniority. Plaintiffs do not challenge this seniority provisions.

[27] See, e.g., paragraphs 14, 15 and 17, infra.

[28] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this subchapter.

[29] The 1976 Collective Bargaining Agreement changed the time period to 1 year. The seniority provisions are not being challenged here; rather, plaintiffs contend that they were administered by the Company in a racially discriminatory manner.

[30] Appendix I to 1973-76 Collective Bargaining Agreement sets out the bumping procedures as follows:

PROCEDURE FOR ADMINISTERING
SECTION 15.7

In administering the procedures for handling displacement rights for employees under Section 15.7, the parties seek to achieve the following basic objectives:

(A) Displacements under the bumping procedure shall be limited to one

day per week.

(B) Employees who exercise displacement rights shall be assigned by management to jobs which can be performed with a minimum training period in order to reduce potential disqualifications.

(C) Employees who are displaced under the changed procedure shall be those employees on the active payroll having the least amount of continuous company service.

The procedure for accomplishing these objectives shall be as follows:

(1) Local plant management must decide no later than Thursday noon of each week the levels of production they wish to maintain for the following week. The production departments and the employment office are to be given this information (by a person designated this responsibility by the local Plant Manager) no later than Thursday noon in order that they can properly plan adjustments in their gangs in the plant departments and determine the employees who are to be laid off as a result of gang reductions as well as those employees to be recalled from layoff for any gang increases. The advance planning required under this procedure is the key to successful handling of the bumping procedure.

(2) As soon as the employment office determines employees who are to be laid off, such employees are to be

notified by written notice on Thursday afternoon of their layoff and of the date on which it becomes effective. The department release form for layoffs contains instructions to employees with more than 5 years continuous service who may be entitled to bumping rights in other departments. Such employees who desire to exercise displacement rights will be required to register at the employment office Thursday after completing their day's work and no later than the time to be designated by the local plant for closing of the bumping register on Friday.

The register form provides space for the employee to designate his preference (first, second and third) for exercising displacement rights in departments where the employees with the least amount of service are working. The employment office is to have available a list of such departments for review on the part of the displacing employees at the time they appear to register.

(3) Immediately after the closing of the bumping register and prior to the end of the work day on Friday the employment department will make assignments to the registered employees in the order of continuous service, giving preference to the choices indicated by the employee. When two or more employees indicate the same preference of departments, the employee with the longest service is to be given his first choice unless there are extenuating

circumstances (such as physical requirements of the job to be performed) preventing such assignment.

In Section 15.7(a)(2), it is stated that the Employment Office will proceed to assign registered employees to departments in the order of their continuous service and whenever possible in accordance with the preference indicated by the employee. Deviations from this rule are to be made in cases such as situations where the choices of departments indicated by the employees no longer exist because of the fact that longer service employees who have registered have already exercised their right and received assignments to such jobs.

Employees with the least amount of company service being displaced by the registered employees are to be notified of their layoffs preferably before they leave work on the last scheduled work day of their work week. If it is not physically possible to do so they must be notified by telegram prior to the first work day of the following week. Employees who have registered for displacement rights are to be required to stop at the employment office on their way home from work Friday in order to pick up their starting tickets for their new assignments. Actual displacement in these cases becomes effective as of the first work day of the work week immediately following their layoff.

(4) Employees who are not working on the day of their layoff and who may be eligible for displacement rights are to be notified of their layoff by wire and will be given the same opportunity to exercise displacement rights as those employees who are working, provided such employees notify the employment office of their desire and register at the employment office on Friday to receive their new assignment. This consideration is to be given to employees who are absent for legitimate reasons, such as vacations, sick leave, injury, or leaves of absence which have been authorized by management.

Local Union officers or bargaining committee members who are on approved leave of absence for the purpose of conducting Union business away from their plant City at the time of layoff, shall in the week in which they return to work be given preference on any job openings which may occur under Section 15.6 and will be given an opportunity to register for displacement rights on Thursday and Friday of that week.

(5) Employees who are eligible to exercise displacement rights but who do not register for such rights in accordance with the procedure outlined in the foregoing and employees who are disqualified after bumping into a department shall again be permitted to exercise their rights by notifying the employment office and registering for their new assignments no later than Wednesday

preceding the week in which they desire to displace. Employees who fail to obtain employment within a 60 calendar day period following their layoff or date of disqualification, as the case may be, shall not again be eligible to further displacement rights until they have been recalled in line of seniority in their own departments or hired under the provisions of Section 15.6 and subsequently laid off. Employees who are unable to obtain employment under this procedure because no other employee with less service is working during the 60 calendar day period may be granted a second 60 day period in which to exercise displacement rights provided they request such extension prior to the end of the first 60 calendar days of layoff.

Employees who are laid off and have more than 5 years of service and who are physically disabled for any or all of the 60 calendar day period shall be entitled to exercise displacement rights within a two week period following the date of their recovery or the end of the 60 day period, whichever occurs later.

Employees who accept their new assignments under this displacement procedure but without good cause fail to report as scheduled or voluntarily quit a job after bumping in on it shall not again be eligible to exercise their rights until they have been recalled in their own seniority departments and subsequently laid off. This,

however, shall not disqualify such employees under Section 15.6.

(6) In some plants it may be desirable due to peculiar circumstances to set a limitation on the number of employees who may be bumped into a department in any one week. Limitations in this area are permissible provided they can be arrived at by agreement in writing with the local bargaining committee. If serious disruptions are feared in this connection, the local plant must notify the home office since the International Office of the Union has agreed to cooperate in working out such problems.

(7) The policy of assigning the person exercising bumping rights to the job of the employee being bumped is no longer required. In changing this policy it shall be the practice to assign displacing employees to the least skill jobs in the department.

Rearrangement of regular employees remaining in the department in order to fill the jobs vacated by employees being displaced shall be made in accordance with past practice for filling temporary vacancies. (In filling the jobs of such displaced employees, however, you are not to recall employees in line with departmental seniority and instead make assignments to these jobs from regular employees who are working.) If no one in the department is capable of performing such vacated jobs, it will be necessary to train the next employee

in line with seniority from those who are on the payroll at that time.

In the event of future bumping into the department under this procedure there will be a trained senior employee available for assignment to the highly skilled job and the problem of training in the future will be minimized. In the event of such training, employees will be given a reasonable time in which to learn the job under circumstances which would be considered normal for such training in promoting employees within the department in situations other than those arising out of displacement.

Job assignments within the departments which are affected by the displacement procedures must be made on a fair and equitable basis and without discrimination.

(8) The practice of bypassing certain jobs is to be discontinued and employees having the least amount of company service are the ones who must be laid off as a result of the displacement procedure. Examples of cases where bypassing may be the exception are: (a) a mechanical department where all of the employees in the department have refused to promote to a skilled job they consider undesirable. Exceptions to this rule will be granted only in rare circumstances with home office approval and then only after local management has completely justified their position in bypassing any job. In all cases

where bypassing takes place, the supervisor must immediately start training another employee from his department seniority list to fill the job.

(9) Employees working as temporary replacements hired on a day-to-day basis under the new procedure are not subject to bumping. As a matter of clarification an employee hired as a temporary replacement in his own department is to be laid off in preference to employees who have bumped into this department when the need for temporary replacement no longer exists.

(10) Any written local agreements which are consistent with these changes in policy may be continued without change. Any deviation from the new policy must have home office approval. The objective in establishing the new policy is to make the procedure uniform throughout all plants and to hold deviations to an absolute minimum.

(11) Employees who displace and fail to report as scheduled or fail to perform properly due to deliberate action on their part shall be subject to disciplinary action. Prior to taking disciplinary action in such cases, management must advise the Local Union committee of the problem and discuss it with them.

(12) Employees who accept assignments under this procedure will be given six months temporary department

seniority in the department in which the displacement takes place. Such employees must, when recalled, return to their original seniority department or forfeit that seniority and hold seniority in the new department only from the date hired in the new department. Employees who do not elect to follow the displacement procedure may still apply for employment under the provisions of Section 15.6.

Employees, who after registering fail to accept the assignment given them by the employment office, shall have no further displacement rights until they are recalled to their own seniority department and subsequently laid off. In such cases, however, the employee whom they would have displaced, had they accepted their assignment, is to be laid off and replaced with a temporary replacement. In such cases the temporary replacement may be the employee who is laid off from the department. These cases will usually occur when the employees having the least continuous service are working in departments considered to be undesirable on the part of most employees. In these cases the Union may be instrumental in convincing employees to accept their assignments and if this occurs and the employee involved remains on his assignment for at least a one week period and then voluntarily quits he shall not be deprived of further displacement rights within a 60 day period following the date of his quitting. (Emphasis in

original).

[31] List of employees with 5 or more years of Company employ who had registered with the Company to exercise bumping rights. See Appendix I(2), supra, footnote 30.

[32] Appendix I(9), supra, footnote 30.

[33] See text at footnotes 5 and 23, supra.

[34] See findings of fact 19, supra.

[35] See findings of fact 15.

[36] See Trial Transcript, pp. 814-815; Plaintiffs' Exhibit 28B.

[37] Non-applicants have the heavy burden of demonstrating that but for the Company's pervasive practice of excluding blacks from supervisory and sales positions, they would have sought such employment, were available and were qualified for the positions. Teamsters, supra at 267-271 and n. 53.

Curtis HOLSEY; Jackie L. Drakeford; Julius Frazier; and Mynell Bennett; Linwood Edwards; Laura Harvey; Janie Hill, Appellees,

v.

ARMOUR & COMPANY, Appellant.

Nos. 81-1312, 81-1515.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 11, 1981.

Decided July 23, 1982.

Before BUTZNER, RUSSELL and SPROUSE, Circuit Judges.

PER CURIAM:

Armour & Company appeals from a district court judgment concluding that the company engaged in racially discriminatory practices violative of Title VII, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. Because the district court may have improperly allocated the burden of proof, we vacate the judgment of

the district court and remand the case for further proceedings.

Following the district court's decision in this case, the Supreme Court clarified the evidentiary burdens of Title VII actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The plaintiff must initially establish by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff makes this showing, the burden shifts to the defendant, who must "'articulate some legitimate, nondiscriminatory reason'" for the action. 450 U.S. at 253, 101 S.Ct. at 1094 (citation omitted). This latter burden, however, is one of production, not persuasion. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55, 101 S.Ct. at 1094 (citation, footnote omitted). If the defendant offers a

nondiscriminatory explanation for the action, the plaintiff then must show that the proffered reasons are merely "a pretext for discrimination." 450 U.S. at 253, 1010 S.Ct. at 1094. Throughout the proceedings, the Court emphasized, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253, 101 S.Ct. at 1094.

The district court did not have the benefit of the Supreme Court's recent guidance in Burdine at the time this case was tried. The district court's findings of fact suggest that the burden of proof may have been allocated contrary to the principles of Burdine. For example, in concluding that the company discriminated against black employees in the filling of supervisory positions, the district court made the following finding: "Defendant suggested that [one named

plaintiff] lacked aggressiveness but offered no reliable evidence of how [his] lack of aggressiveness was to be measured with the number of junior white employees [who] were promoted over him to supervisory positions." The court also found that junior white employees were promoted to a supervisory position over another black applicant. It added: "Defendant offered no reliable evidence to establish that the employees selected were more qualified or even equally as qualified as [the black applicant]." This language suggests that the district court may have required the company to do more than "articulate a legitimate, nondiscriminatory reason" for their employment decision. It is possible, however, that these findings merely express factors considered in determining that the company's explanations were pretexts for discrimination.

The uncertainty surrounding the allocation of the burden of proof in this case

is enhanced by the nature of the district court's findings and conclusions. Following the trial, the district court issued a Memorandum of Decision which set forth general reasons for sustaining the plaintiffs' claims and directed the plaintiffs' attorneys to prepare findings of fact and conclusions of law. Thereafter, plaintiffs' counsel filed an extensive document which, over the objections of the defendant, was adopted by the district court with immaterial changes.

In the past we have cautioned against the practice of adopting in this manner the prevailing party's proposed findings and conclusions. White v. Carolina Paperboard Corp., 564 F.2d 1073, 1082-83 (4th Cir. 1977); Chicopee Manufacturing Corp. v. Kendall Company, 288 F.2d 719, 725-25 (4th Cir. 1961). The adversarial tone of such findings accords them less "weight and dignity [than] . . . the unfettered and independent judgment of the trial judge." The SEVERANCE, 152 F.2d 916,

918 (4th Cir. 1945). Moreover, in this case the practice increased the ambiguity surrounding the district court's allocation of the burden of proof.

Because we are unable to properly assess the district court's findings, we vacate the judgment of the district court and remand the case for further proceedings. On remand, the district court should reconsider the case in light of the principles announced in Burdine, White, Chicopee, and The SEVERANCE.

VACATED AND REMANDED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent.

The majority succinctly and correctly explicates the evidentiary analysis required by Burdine. I, of course, agree with the majority that if the district court had imposed upon the defendant the burden of persuasion on the issue of whether Armour had legitimate, nondiscriminatory reasons for its

contested actions, such a ruling would require reversal. In my view, however, the district court's opinion properly placed upon the plaintiffs the ultimate burden of persuading the court that Armour was guilty of discriminatory practices.

Armour contends that several of the district court's findings of fact indicate that the burden of persuasion was shifted from the plaintiffs to the defendant, in contravention of Burdine. However, as the majority concedes, the findings of which Armour complains are fairly susceptible to two interpretations. If these findings are viewed as evidence that Armour was required to do more than meet a burden of production, Burdine was, of course, violated. But, they also can be viewed as indicia that the district court properly considered all the evidence offered by the defendant, along with that offered by the plaintiffs, in determining whether the plaintiffs successfully demonstrated that the

reasons advanced by Armour were pretextual. This would be entirely in accord with the Burdine analysis.

The majority concludes that this perceived ambiguity with respect to several of the district court's findings requires that the judgment of the court be vacated. If the disputed findings were standing alone, this analysis might well be correct. Viewed in its entirety, however, the district court opinion indicates that the court properly considered the burden of persuasion to at all times be upon the plaintiffs. In specifically drawn conclusions of law, the district court set out the defendant's burden once the plaintiffs had established a prima facie case: "[T]he Company need only offer a reasonable, non-racial explanation for its practices and does not assume the burden of proof . . . ." This analysis clearly is in accord with the teaching of Burdine. The district court, after reviewing the evidence presented by both

plaintiffs and defendant, concluded that Armour's explanations for its conduct were pretextual and that plaintiffs "carried their burden of establishing liability." This too is in accord with the Burdine analysis.

In my view, to conclude that the district court opinion evinces "uncertainty surrounding the allocation of the burden of proof" is to deny all meaning to the court's clear and unequivocal statements. The better approach is to give credence to all of the district court's findings by construing those few specific findings the majority finds ambiguous in harmony with the court's other, unambiguous pronouncements on the allocation of the burden of proof.

It is true that the district court opinion, even when viewed in its entirety, does not reflect every nuance of the Burdine analysis. The accident of chronology obviously made it impossible for the district court to track exactly the language of Burdine

-- a handicap suffered by every pre-Burdine opinion. Burdine, however, plowed no new sod; its principal contribution was to clarify the evidentiary analysis previously established in Title VII cases. Burdine emphatically requires that the burden of persuasion remain at all times with the plaintiff; it does not require reversal of all district court decisions which do not track precisely the Burdine language.

We should not view district court decisions, even those from the pre-Burdine era, with an uncritical eye. Neither should we, in the interest of clarity, strain to find ambiguity where none exists. The district court said that Armour "does not assume the burden of proof" and each of its findings of fact and conclusions of law is consistent with this statement. Therefore, as the district court did not incorrectly allocate the ultimate evidentiary burden, I must respectfully dissent.